No. 93-1341

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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The Brief for the United States and FERC ("amici") adopts wholesale several arguments pressed by various respondents in the three related Petitions. *See* Br. U.S. at 11-15. These arguments have been fully briefed by the parties and petitioners will not belabor them here. Instead, petitioners address one modification of an old argument and one new argument presented by the amici.[1]

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[1] Petitioners also point out that amici conspicuously omitted one argument that two respondents have asserted in the related Peti-

1. The United States and FERC argue that "the application of FERC's 'legally enforceable obligation' standard in the context of this case amounts to a decision under Pennsylvania law and procedure within the broad parameters set by the text and purposes of PURPA and FERC's regulations." Br. U.S. at 17-18. Whether a Pennsylvania tribunal's application of a federal standard can "amount to" a decision under Pennsylvania law is an intriguing question. But whatever the state tribunals' decisions in this case amount to, they are *in fact* applications of federal law, and thus it is within this Court's province to review them. Indeed, the Administrative Law Judge in this case originally ruled that the PUC could not modify the contract because it had no power to do so under state law. App. L, at 213a-219a. The PUC agreed that it had no power to modify the contract under state law, but it held that under PURPA it had the power to accomplish the same result, App. N, at 287a-288a, and the Commonwealth Court affirmed the PUC for the same reason, App. B, at 39a.

2. Amici also argue that proposed amendments to Pennsylvania's PURPA regulations might obviate the questions presented by these Petitions, an argument never raised by respondent PUC, the entity that promulgated the regulations. Although amended regulations have been under consideration for seven years, it is already clear that even if the proposed regulations are enacted they will not affect the issues raised by these Petitions.

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tions; i.e., that the Petitions should be denied because petitioners could have sought an opinion from FERC's general counsel if they believed that the PUC had not correctly interpreted the FERC regulations. *See* Br. Opp. of Resp. Milesburg Energy, Inc., at 8-9 & n.4; *see also* Br. Opp. of Resp. North Branch Energy Partners in No. 94-7, at 20-21. Amici's failure to include respondents' argument in their Brief convincingly demonstrates that FERC itself thinks the argument has no merit.

The first question presented focuses on the scope of a state utility commission's authority to modify[2] a privately negotiated contract between a utility and a PURPA qualifying facility. Petitioners argue that federal law requires state commissions to honor privately negotiated contracts, particularly insofar as utilities and qualifying facilities agree on milestone dates or other provisions designed to protect utility customers. Contrary to the implication of amici's argument, the proposed amendments to the PUC regulations continue to recognize a role for private agreements. *See* 24 Pa. Bull. 4091, 4100 (Aug. 13, 1994). The amendments simply would create a new competitive bidding process for commission-mandated contracts. Thus, the precise issues presented in these cases may recur in the future, so long as the PUC exercises its presumed "federal" power to abrogate or modify milestone dates.

The second question presented focuses on when a legally enforceable obligation arises under federal law. Petitioners assert that the PUC's modification (or abrogation) of a contract milestone date, which was included in the parties' contract to protect ratepayers, necessarily changed the date of the legally enforceable obligation, and at a minimum the PUC was required by federal law to recalculate avoided costs and ensure that they were fair to ratepayers as of the modification date. Thus, the actual commission action at issue in this case is the propriety under federal law of the PUC's modification of milestone dates in a contract between the parties.

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[2] Although the PUC and the Commonwealth Court stated that they had no power to modify the parties' contract, they effectively modified the contract by ordering that the parties enter into a new contract with identical terms, except for the milestone dates. *See* Petition at 9-14. Moreover, in the *Shannopin* and *Burgettstown* proceedings, the Pennsylvania tribunals expressly ordered modification of the privately negotiated agreements by changing the milestone dates. *See* Petition for Certiorari in No. 93-1535, at 12-14; Petition for Certiorari in No. 94-7, at 11, 15.

The proposed Pennsylvania regulations would not affect that issue. In fact, in the administrative proceedings connected with the proposed new regulations, petitioner West Penn excepted to a suggestion by the Administrative Law Judge that the new regulations would give the PUC authority to modify contract milestone dates, and West Penn suggested that the PUC delay a decision on any regulation addressing milestone dates at least until the Pennsylvania Supreme Court issued an opinion in this case. The PUC granted West Penn's exception, because it found that it already had the authority under PURPA (which it had exercised in these cases) to modify contract milestone dates. Thus, the PUC specifically determined that the Commonwealth Court opinion in this case rendered unnecessary any new regulation on the subject of milestone modifications. *See* 24 Pa. Bull. 4091, 4096. Accordingly, it is already clear that even if the pending PUC regulations are adopted, they will have no effect on the conduct of the PUC that petitioners have challenged in these cases as inconsistent with the requirements of PURPA.

CONCLUSION

This Petition and the Petitions in Nos. 93-1535 and 94-7 should be granted and consolidated for plenary review.

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